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Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension Between State Sovereign Rights and Federal Treaty Obligations

Cory Eichhorn

COMMENT

ELEVENTH AMENDMENT IMMUNITY JURISPRUDENCE IN AN ERA OF GLOBALIZATION: THE TENSION BETWEEN STATE SOVEREIGN RIGHTS AND FEDERAL TREATY OBLIGATIONS

I. INTRODUCTION

Over the past decade, the Supreme Court has strengthened the ability of states to assert immunity from suit by private actors through the Eleventh Amendment.[1] Through the current structure of Eleventh Amendment immunity jurisprudence, the Supreme Court has increased states' rights while limiting individual rights. The Supreme Court, however, has not confronted Eleventh Amendment immunity in the international context. Specifically, the Court has failed to address whether states can assert their Eleventh Amendment immunity against suit by private actors for violations of treaties and international agreements.[2] This question represents the inherent tension between state treaty obligations and state sovereign immunity under the Eleventh Amendment.

As the world becomes increasingly global in nature,[3] this issue could create serious consequences for the flow of international business and trade across foreign borders. The ability of the United States to cohesively develop foreign trade, including the exporting and importing of goods and services, creates an incentive for the United States to adhere to treaty obligations. Although the Supreme Court has limited Eleventh Amendment immunity jurisprudence to the domestic arena, far-reaching consequences could occur if Eleventh Amendment immunity is extended to states' violations of federal obligations across borders. Moreover, the Supreme Court's reluctance to address the availability of Eleventh Amendment immunity to states in private suit for violation of treaties may also deter other countries from engaging in trade with the United States, for fear

1. The Eleventh Amendment of the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment prevents suits against a state, state agencies, and arms of the state by private actors in federal court.

2. *See* James G. Wilson, *The Eleventh Amendment Cases: Going "Too Far" with Judicial Neofederalism*, 33 LOY. L.A. L. REV. 1687, 1713-14 (2000) (suggesting the importance and necessity of the Supreme Court deciding "whether private parties will be able to sue states and their agents for violations of international treaties").

3. *See* Richard Rivlin, *Technology Links Lead the Charge: International vs the US Market*, TIMES (LONDON), Sep. 22, 1999, at 2 (suggesting the rise and impact of globalization on the world market). Today, more American employment revolves around foreign trade than ever before. *See* Richard Foster, *World Trade Hits Home for Many Americans, Milwaukee Journal Sentinel*, Febraury 4, 2001, at 1J.

that individual states could circumvent the treaty process.

Such a Supreme Court decision could have particularly far-reaching effects on United States' trade with Latin America. In light of current President George W. Bush's commitment to free trade in the western hemisphere, a large increase in trade with Latin American nations is predicted to occur in the next decade.[4] Free trade with Latin America and other countries may soon occur through the Free Trade Area of the Americas (FTAA), an agreement Bush is currently aggressively pursuing.[5] In addition, a new United States law, which takes effect in March of 2001, opens limited trade access to Cuba.[6] Although the law was once thought to make a negligible impact, analysts expect it will allow a surprising influx of goods into Havana Harbor.[7] Such diverse products include fertilizer, cigarettes, washing machines and live sheep.[8]

Although such trade agreements are contingent on a variety of political and economic factors, there are real possibilities of foreign trade in Latin America taking on a renewed importance under the pro free trade administration of George W. Bush. Thus, Latin American nations may be reluctant to enter into trade negotiations if states can assert Eleventh Amendment immunity in trade agreements with the United States.

This Case Comment argues that whatever the outcome regarding this imminent problem on the horizon, the Supreme Court cannot uphold the Eleventh Amendment immunity of states sued by private actors for violations of treaties. Part II discusses the jurisprudence of the Eleventh Amendment. Part III outlines certain treaty provisions that permit private parties to sue states for violations of treaties and examines private causes of action in the treaty context. Part IV focuses on the Supreme Court's willingness to avoid the Eleventh Amendment immunity question in the foreign arena through the use of the preemption doctrine. Part V argues that the Supreme Court should not uphold such Eleventh Amendment immunity because

4. *See* Edward Alden, Andrew Bounds, and Geoff Dyer, *The Americas: U.S. Push for Trade Pact Faces Hurdle*, Financial Times (London), February 16, 2001, at 7.

5. *See id.*

6. *See* Anthony DePalma, *Waiting at the Gate for Trade with Cuba*, N.Y. TIMES, February 4, 2001, § 3, at 4.

7. *See id.*

8. *See id.*

of the principles set forth in the Supremacy Clause and focuses on lower court interpretation of Eleventh Amendment immunity in the international arena. Part VI analyzes Eleventh Amendment immunity from a state qua state versus state as market participant model. In conclusion, Part VII, offers possible directions the Court could take to resolve this issue.

II. HISTORICAL BACKGROUND OF THE ELEVENTH AMENDMENT

Before the adoption of the Eleventh Amendment, the Supreme Court decided *Chisolm v. Georgia.*[9] In *Chisolm,* a South Carolina citizen sued to recover a debt from the state of Georgia.[10] The decedent had provided military equipment to Georgia in the course of the Revolutionary War.[11] The state of Georgia refused payment on the debt, even though the Georgia state legislature had appropriated such funds.[12] Upon the decedent's death, Chisolm brought suit as executor of his estate.[13] Edward Randolph, who represented Chisolm in the suit, argued that Article III of the Constitution authorized suits against states by citizens of other states.[14] The Supreme Court agreed with Randolph and clearly held that the Constitution did not create an obstacle to such suits.[15]

In response to the *Chisolm* decision, state legislators petitioned for a constitutional amendment preventing suits against states by citizens of other states in federal court.[16] The Revolutionary War had created serious problems for state governments because they were forced to borrow money from private investors to finance weapons, food, and supplies for their militia.[17] After the Revolutionary War, the states did not have

9. 2 U.S. (2 Dall.) 419 (1793).

10. *See id.* at 420. The action was based on the common law writ of assumpsit. *See id.* at 430. Jurisdiction was premised on the Judiciary Act of 1789 which provided that states could be sued by citizens of another state. *See id.* at 431.

11. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 394 (1999).

12. *See id.*

13. *See id.*

14. *See id.*

15. 2 U.S. at 466. Four justices, Blair, Wilson, Cohen and Jay, found Article III permitted suits against a state by citizens of another state. *See* Chemerinsky, *supra* note 11, at 394. Justice Iredell dissented, arguing that the plain language of the Judiciary Act did not authorize suits for money damages against states and that suits against states were not permitted under traditional English common law. *See id.* at 395.

16. *See id.* at 394.

17. *See id.* at 395.

sufficient funds to pay back such debts.[18] State sovereign immunity provided a bar against suits that sought to recover these legal debts. As a result, the Eleventh Amendment was passed by Congress in 1789.[19]

Hans v. Lousiana[20] broadened the scope of the Eleventh Amendment and expanded the doctrine of state sovereign immunity. In *Hans*, a citizen of Louisiana brought suit against Louisiana to recover coupons from bonds of the state.[21] The Supreme Court read beyond the plain language of the Eleventh Amendment and held that a state cannot be sued by a citizen of its own state in federal court without consent.[22]

Over one hundred years later, the Supreme Court further entrenched and re-affirmed the *Hans* decision in *Seminole Tribe of Florida v. Florida*.[23] In *Seminole Tribe*, the Seminole Tribe of Indians sued the state of Florida and Governor Lawton Chiles in federal court for a violation of the Indian Gaming Regulatory Act.[24] The plaintiffs alleged that the State of Florida had violated its duty to negotiate in good faith with the Tribe for the formation of a compact that regulated gaming activities.[25] The Supreme Court held that the Eleventh Amendment barred the suit by a citizen of Florida against Florida and its governor.[26]

Finally, in *Alden v. Maine*,[27] the Supreme Court took a further step in its expansion of Eleventh Amendment immunity jurisprudence. In *Alden*, a group of probation officers sued their employer under the Fair Labor Standards Act of 1938[28] in state court.[29] The Supreme Court held that the Eleventh Amendment barred such a suit in the absence of consent.[30] Effectively, the Supreme Court held that states cannot be sued by citizens of the

18. *See id.*
19. *See id.* at 395-96.
20. 134 U.S. 1 (1890).
21. *See id.* at 21.
22. *See id.* at 1.
23. 517 U.S. 44 (1996).
24. 25 U.S.C. § 2710(d)(1)(c) (1988); *see also* 517 U.S. at 47 (explaining that Section 2710(d)(7) permits tribes to bring suit in federal court).
25. *See id.*
26. *See id.* at 76.
27. 527 U.S. 706 (1999).
28. 29 U.S.C. § 201 et seq.
29. *See Alden*, 507 U.S. at 711.
30. *See* id. at 754.

same state in state court.[31]

The extension of Eleventh Amendment immunity in the domestic arena signals the increase of states' rights and the submergence of federal law. Such a doctrine could severely impact the international arena, if states are sued by private actors for violations of treaties. Thus, Eleventh Amendment immunity and United States' treaty obligations may be on a collision course.

III. PRIVATE CAUSES OF ACTION IN THE TREATY CONTEXT

In order for the issue of the states asserting their Eleventh Amendment immunity for violations of treaties to arise, the treaty in question must provide either a private cause of action in federal court or a federal statute must confer jurisdiction. The Supreme Court has set forth two categories of treaties: Self-executing and non-self-executing treaties.[32] In *Whitney v. Robertson*, the Supreme Court set forth the doctrine of self-executing treaties.[33] The *Whitney* Court determined that self-executing treaties require no legislation to become operative, whereas legislation is necessary to carry non-self-executing treaties into effect.[34] In other words, self-executing treaties do not require prior legislation for enforcement in domestic courts, whereas Congress must enact certain jurisdictional statutes in order for non-self-executing treaties to be enforced by the judiciary.[35]

Although self-executing treaties require no prior legislation in order to be judicially enforced, the question of whether a treaty is self-executing and whether a treaty provides a private cause of action are not one in the same.[36] When confronting a dispute concerning a self-executing treaty, a court must "look to the intent of the signatory parties as manifested by the language of

31. *See id.* at 760-61 (Souter, J. dissenting).

32. *See* Whitney v. Robertson, 124 U.S. 190 (1888).

33. *See id.* at 194.

34. *See id.*

35. *See* Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM.J.INT'L.L. 695, 696 (1995) (arguing that the legislature retains an important power over the judiciary in the international arena, because under the last-in-time rule, a statute enacted after a treaty takes precedence.)

36. *See* Restatement (Third) of Foreign Relations § 111, Comment H (1987) (stating that: "[w]hether a treaty is self executing is a question distinct from whether the treaty creates private rights or remedies.")

the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution."[37] Therefore, higher courts often have the power to determine whether a self-executing treaty provides a private cause of action. The Rehnquist court, however, has restricted the doctrine of self-executing treaties to provide limited private causes of action. Even though the recent Supreme Court has attempted to limit individual rights, some self-executing treaties do provide private causes of action or the equivalent of private causes of action.[38] Thus, the Eleventh Amendment and United States treaty obligations could possibly conflict in the near future.

In addition to private causes of action, there are other options for litigants seeking to enforce treaty rights. For example, treaty rights may be enforced through common law forms of action or statutory provisions that permit suit for violations of liberty or property interests.[39] Such common law claims include actions in debt and actions of ejectment.[40] In addition, federal statutes may confer rights of action to enforce treaty obligations.[41] Such federal statutes include habeas corpus petitions to enforce extradition treaties.[42] Moreover, section 1983[43] and the Administrative Procedure Act[44] set forth causes of action to uphold federal law against state government agencies and officials.[45]

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37. Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).

38. *See* British Caledonian Airways v. Bond, 665 F.2d 1153 (D.C. Cir. 1981). In *British Caledonian Airways*, a group of airline companies sued the administrator of the Federal Aviation Administration (FAA), arguing that that the FAA's issuance of an administrative order, which prohibited the operation of foreign-registered DC-10 aircraft within U.S. airspace, was in violation of Article 33 of the Chicago Convention and other bilateral treaties. *Id.* at 1156-59. The court held that the treaty provisions "state rules that may not be qualified or modified through legislation or administrative regulations enacted by the individual signatory nations, consistent with the international obligations undertaken by each nation that is party to the convention." *Id.* at 1161. Thus, the court allowed private actors to sue an agency of the United States Government for a violation of a treaty.

Similarly in *Consulate General of Mexico v. Phillips*, a United States District Court held that a Bilateral Convention between Mexico and the United States regarding the duties of consulates to prisoners, provided a private cause of action in federal court. *See* Consulate General of Mexico v. Phillips, 17 F.Supp.2d 1318, 1322 (S.D.Fla. 1998).

39. *See* Vazquez, *supra* note 35, at 720.

40. *See id.* at n. 118.

41. *See id.*

42. *See id.*

43. 42 U.S.C. § 1983 (1979).

44. 5 U.S.C. § 701, et seq. (1946).

45. *See id.*

A. Hypothetical Example of a Claim Based on Treaty Rights

For example, one could assert a right under the United Nations Charter against a state and demand money damages as a remedy.[46] Certain state law provides that state government employees speak only in English.[47] Thus, a plaintiff could claim linguistic discrimination against the federal or a state government based on Article 55 (c) of the United Nations Charter, which prohibits such language-based discrimination.[48] Despite the fact that state and federal law provide no cause of action for linguistic discrimination, a plaintiff could argue that the provisions of the Charter are legally binding on the federal and state government under the Supremacy Clause.[49] The claimant could seek a remedy under 42 U.S.C. § 1983.[50]

Although litigants could attempt to file suit under certain treaty provisions, it is unclear whether the Supreme Court would enforce such a right. The Court often avoids upholding a private cause of action under such treaties because the treaty may be non-self-executing, or the conflict over the treaty may represent a non-justiciable political question.[51] The Court also avoids deciding an issue based on treaty law because the standard may be unclear or the Court finds no private cause of action.[52]

IV. SKIRTING THE ELEVENTH AMENDMENT IMMUNITY QUESTION

Recently, the Supreme Court has confronted the inherent conflict between an increase in United States international obligations and the rise of states' rights in the federalism context. Although the Supreme Court has not directly addressed

46. *See* Harvard Law Review Association, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L.REV. 1269, 1271 (1991).

47. *See id.*

48. *See id.* In addition, the hypothetical plaintiff could point to Article 56 of the Charter, which provides that parties to the agreement "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* at 1271-72 (quoting U.N. Charter 56(c)).

49. *See id.*

50. *See id.*

51. *See id.* at 1275-76. If such a non-justiciable political question exists the Court should defer to the President or the Legislature.

52. *See id.* at 1278-80.

Eleventh Amendment immunity in the treaty context, the Court has ruled on state violations of federal law that affect foreign nations. In *Crosby v. National Foreign Trade Council*[53] and *United States v. Locke*,[54] the Supreme Court relied on the preemption doctrine to resolve conflicts between federal and state law. In both cases, the Court avoided questions of Eleventh Amendment immunity in the international arena. Even though the Supreme Court upheld federal rights in both *Crosby* and *Locke*, the Court left open the possibility that states may assert their Eleventh Amendment immunity in a suit by private actors for violations of a treaty.

At issue in *Crosby* was a Massachusetts state statute that limited the authority of state agencies to purchase goods or services from any company engaged in business with Burma.[55] Only three months after Massachusetts enacted this law, Congress adopted a federal law imposing certain sanctions and restrictions on trade with Burma.[56] The federal law was enacted in response to the massive human rights violations occurring in Burma.[57] Plaintiff, National Foreign Trade Council ("Council"), was listed on the Massachusetts "restricted purchase list" in 1998. The Council filed a complaint in federal district court, contending that the Massachusetts law contravened the federal foreign affairs power, the Foreign Commerce Clause, and "was preempted by the federal act."[58] The Supreme Court struck down

53. 120 S.Ct. 2288 (2000).

54. 120 S.Ct. 1135 (2000).

55. *See Crosby*, 120 S.Ct. at 2291. The statute sets forth companies on a "restricted purchase list" from which state entities may not purchase goods or services. *See id.*

56. *See id.* The law is entitled the Foreign Operations, Export Financing and Related Appropriations Act. See 1997, § 570, 110 Stat. 3009-166 to 3009-167(enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172.) The Act is divided into five sections. *Id.* The first section bars all government aid to the Burmese Government for pro-humanitarian and counternarcotic efforts. *Id.* The second section authorizes the President to create and enforce additional sanctions pursuant to certain conditions. *Id.* at 2292. The third section instructs the President to establish "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and quality of life in Burma." *Id.* (quoting § 570(c)). The fourth and fifth sections are procedural in nature. The fourth section mandates that the President report at regular intervals to certain congressional committees on the development toward democratization in Burma. *Id.* Finally, the fifth provision permits the President "to waive, temporarily or permanently, any sanction" under the act if any such sanction is "contrary to the national security interests of the United States." *Id.* (quoting § 570 (e)).

57. *See id.*

58. *Crosby*, 120 S.Ct. at 2293.

the state law solely on preemption grounds. First, the Court determined that Congress intended the federal Act to empower the President with "flexible and effective authority,"[59] and that the state law would confine the President's decision making authority because of the additional system of state economic interference with Burma.[60] Second, the federal law was an attempt to "limit economic pressure against the Burmese government to a specific range," whereas the state law had a more far-reaching effect.[61] Finally, the Court found that the state law substantially interfered with the President's ability to create a multilateral strategy for democratization in Burma.[62]

In *Locke*, the Supreme Court again confronted a state statute that was at odds with federal law. The controversy arose out of the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska.[63] In response to the disaster, the state of Washington created an agency designed to promulgate certain standards in an attempt to develop the "best achievable protection ("BAP") from damages caused by the discharge of oil."[64] Such standards included regulation of tanker design, equipment, reporting and operating requirements.[65] Subsequent to the passage of these standards, a trade association of oil tankers, Intertanko, brought suit in the Western District of Washington seeking declaratory and injunctive relief from the regulations set forth by the state of Washington.[66] Intertanko argued that the BAP standards were preempted by federal law, specifically the Port and Waterways Safety Act of 1972 ("PWSA").[67] The district court upheld Washington's regulations.[68]

On appeal in the Ninth Circuit, the United States intervened because of the substantial federal interest accorded the issue.[69] The Supreme Court noted the international implications of the conflict between the Washington statute and PWSA.[70] The Court

59. *See id.* at 2295.
60. *See id.* at 2296.
61. *See id.* at 2296-97.
62. *See id.* at 2298.
63. *See Locke*, 120 S.Ct. at 1142.
64. *Id.* (quoting Wash. Rev. Code § 88.46.040(3)(1994)).
65. *See id.*
66. *See id.*
67. *See id.*
68. *See id.*
69. *See Locke*, 120 S.Ct. at 1142-43.
70. *See id.* at 1142.

emphasized that the waters surrounding Washington, including Puget Sound, provide access to Canada and other nations.[71] In addition, the Supreme Court pointed to the fact that Intertanko had 305 members, compromising eighty percent of the world's privately owned tankers, of both United States and foreign registry.[72]

In *Locke*, the Supreme Court's decision reflected the traditionally held view that interstate maritime legislation is a matter of federal interest.[73] The Court held that certain provisions of PWSA contravened and preempted the Washington statutes.[74] The *Locke* Court determined that conflict preemption applied to Title I of the PWSA,[75] which governed problems such as water depth and narrowness of tankers.[76] Under the conflict preemption analysis, preemption would occur unless the state regulation was tailored to a particular port or waterway and the Coast Guard had not adopted any regulations on the same subject matter.[77]

In contrast, the *Locke* Court held that field preemption applied to Title II of the PWSA,[78] which generally regulated tankers and crews.[79] The Court found that Washington's regulations concerning general navigation watch principles, English language skills, and casualty reporting were preempted.[80]

The Court's treatment of state violations of federal international obligations in both *Crosby* and *Locke* may signify a willingness to preclude the states' Eleventh Amendment immunity in such a context or avoid the issue in the future. Although a possibility exists for the Supreme Court, under its current pro-states' rights regime, to uphold Eleventh Amendment immunity in the treaty context, such a decision may disrupt unified international federal policy -- the same problems

71. *See id.*
72. *See id.*
73. *See Locke*, 120 S.Ct. at 1143.
74. *See id.* at 1151-52.
75. 33 U.S.C. § 1223, et. seq. (1978).
76. *See Locke*, 120 S.Ct. at 1148.
77. *See id.*
78. 46 U.S.C. § 3703(a), et. seq. (1983).
79. *See Locke*, 120 S.Ct. at 1149.
80. *See id.* at 1152.

the Supreme Court was concerned with in both *Crosby* and *Locke*.

V. SETTING FOOT ON UNCHARTERED GROUND

The Supreme Court's current Eleventh Amendment jurisprudence poses problems when applied to state violations of treaties. The Supreme Court should not set forth a plan that allows states to avail themselves of their Eleventh Amendment immunity in the face of international obligations because of the traditional view of treaties as a uniform law which all states must abide, the possibility of private actors having no forum to enforce their rights, and the serious consequences that such a decision could have on international trade and the United States' position as a world power.

A. The Supremacy Clause and Treaties

The supremacy of treaty law mandates that states can be sued for violations of treaties by private actors.[81] Under the Founding Fathers' vision of the United States' Constitutional structure, treaties are equal in force to federal law.[82] This supremacy of treaty power is subject to the Supreme Court's self-executing treaty doctrine and interpretation as to whether the treaty provides a private cause of action.[83] In addition, the Constitution provides that cases arising under treaties are within the judicial power of the United States.[84]

Although courts have been reluctant to imply private causes of action in domestic courts, there are certain treaties that have been interpreted to create independent causes of action. For example, courts have concluded that the Warsaw Convention[85]

81. *See* Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY.L.A.L.REV. 1283, 1301 (2000) (arguing that states should be subject to suit in state court because the value of supremacy outweighs states' rights and damage suits against states are necessary to ensure supremacy of federal law).

82. *See* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land. . .).

83. *See generally*, Vazquez, *supra* note 35.

84. *See* U.S. Const. art. III, sec. 2. Moreover, civil actions arising under treaties, international law, or international agreements are within the jurisdiction of the United States district courts. *See* 28 U.S.C. § 1331.

85. Warsaw Convention, June 15, 1934, 49 Stat. 3014, 137 L.N.T.S. 11.

provides a private cause action for wrongful death.[86]

Both the *In Re Mexico City Aircrash of October 31, 1979* and *Benjamins v. British Eur. Airways* Courts implied a private cause of action from Article 17 of the Warsaw Convention.[87] Other courts have also implied private causes of action in different contexts. For example, district courts have implied a private cause of action in Article 15 of the Treaty concerning the Convention on International Civil Aviation[88] and the Bilateral Air Transport Service Agreement entered into between Panama and the United States.[89] In *Aerovias*, the court found that Dade County regulations regarding rate schedules at the Miami International Airport conflicted with the provisions of Article 15 of the Chicago Convention and Article 3 of the Panamanian Air Transport Service Agreement.[90] In construing the treaty and executive agreement the court stated: "a treaty conferring private rights on citizens or subjects of the contracting parties is enforceable in the courts of justice."[91] As a result, the court granted an injunction prohibiting the regulations.[92]

Similarly in *Mille Lacs Band of Chippewa Indians v. Minnesota*,[93] the Eighth Circuit concluded that the Mille Lacs Band of Chippewa Indians had hunting, fishing and gathering rights in present-day Wisconsin and Minnesota under an 1837 treaty with the United States.[94] The court also determined that

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86. *See* In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 412 (9th Cir. 1983); *see also* Benjamins v. British Eur. Airways, 572 F.2d 913, 919 (2nd Cir. 1978).

87. Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damage sustained in the event of death or wounding of apassenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of the operations or embarking or disembarking.

Warsaw Convention, art. 17, 137 L.N.T.S. at 23.

88. Chicago Convention on International Civil Aviation, *opened for signature* December 7, 1944, 61 Stat. 1180 [hereinafter Chicago Convention].

89. Panamanian Air Transport Service Agreement, April 14, 1949, U.S.-Panama, art. III, 63 Stat. 93, 2450 TIAS 1932. *See* Aerovias Interamericanas de Panama, S.A. v. Board of County Comm'rs, 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds sub nom.* Board of County Comm'rs v. Aerolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 1961 (1963).

90. *See Aerovias*, 197 F. Supp. at 241.

91. *Id.* at 248.

92. *See id.* at 254-55.

93. 124 F.3d 904 (8th Cir. 1997).

94. *See id.* at 910-21; *see also* Treaty with the Chippewas, July 29, 1837, 7 Stat. 536, art V. The Mille Lacs Band Band of Chippeawa Indians sought a declaratory judgment

an 1850 executive order,[95] 1854 Treaty with the Chippewas,[96] and 1855 Treaty with the Chippewas[97] did not restrict the tribe's rights under the 1837 treaty to hunt, fish, and gather. The *Mille Lacs* Court emphasized the importance of the supremacy of treaty law: "Despite the 160 years that have passed since the signing of the Treaty, it remains good law. One of the hallmarks of our constitutional system is respect for the law, regardless of changing circumstances or the inevitable passage of time."[98]

In addition, the Supreme Court should not uphold Eleventh Amendment immunity for violations of treaty obligations because of the Founding Fathers' inherent belief in the supremacy of treaty law. One of the principal reasons for the adoption of the Constitution was the failure of the Articles of Confederation to mandate state compliance with the nation's treaty obligations.[99] Specifically, the Framers were concerned that state treaty violations could create war, prevent other nations from entering into important agreements with the United States and negatively impact the nation's reputation.[100] These same fundamental and traditional problems could arise if the Supreme Court allows states to assert their Eleventh Amendment immunity in suit by private actors for violations of treaties.

The possibility of the Eleventh Amendment providing a shield for states in the treaty context may also disrupt the delicate federal/state balance set forth in the Constitution. For example, states could decide to boycott United States' international obligations through their Eleventh Amendment immunity.

Under the Rehnquist Court's Eleventh Amendment immunity doctrine there is a real possibility of the states asserting their Eleventh Amendment immunity in the treaty context. Furthermore, the rise of state sovereignty could signal a

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upholding certain "usufructuary" rights in the Minnesota portion of the territory acquired in the 1837 Treaty. *See Mille Lacs*, 124 F.3d at 910.

95. *See id.* at 914.

96. September 30, 1854, 10 Stat. 1109.

97. February 22, 1855, 10 Stat. 1165.

98. *Mille Lacs*, 124 F.3d at 934.

99. *See* Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM L. REV. 1082, 1102 (1992) (arguing that according to the Supremacy Clause, treaties should be enforceable by individuals in federal and state court.)

100. *See id.* at 1110.

departure from the traditional notion that treaty law is essential to a unified, integrated foreign policy.[101]

B. Lower Court Treatment of Eleventh Amendment Immunity as Applied to Treaties

Although treaty-based claims or claims implicating treaties through federal law are unique in nature, lower courts have faced Eleventh Amendment immunity issues in such a context.[102] In *Iberia*, a Spanish government-owned corporation sued the Puerto Rico treasury secretary and port authority director.[103] Iberia operated an airline business that provided travel between Puerto Rico and Spain.[104] In order to fly into and out of Puerto Rico, the Commonwealth levied excise taxes on all parts, supplies and equipment that Iberia utilized in its business.[105] Iberia contended that the excise tax contravened the terms of the Air Transport Agreement (Treaty) between the United States and Spain.[106] The district court held that the Eleventh Amendment barred Iberia's monetary reimbursement claims for past excise taxes.[107]

The lower court decisions in *Iberia* and *Consulate General of Mexico* indicate the judiciary's willingness to pay deference to the states' Eleventh Amendment immunity even in the face of treaty obligations. In the near future, such decisions may have a negative impact on the United States' ability to negotiate favorable treaty provisions. Armed with the knowledge that individual states may disregard treaty obligations without recourse in court, foreign nations may be hesitant to enter into

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101. *See* Head Money Cases, 112 U.S. 580, 598-99 (1884) (stating that "[a treaty, then, is a law of the land as an act of Congress is, whenever it provisions proscribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute.") This traditional conception of treaty law in domestic courts is at odds with the ability of states to assert their Eleventh Amendment immunity in such suits.

102. *See* Iberia Lineas Areas De Espana v. Velez-Silvia, 59 F. Supp. 2d 266 (D. Puerto Rico 1999); *see also* Consulate General of Mexico v. Phillips, 17 F.Supp. 2d 1318 (S.D. Fla. 1998).

103. *See Iberia*, 59 F.Supp.2d at 269.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.* at 272.

trade, communications, and human rights agreements with the United States.

VI. STATE QUA STATE V. STATE AS MARKET PARTICIPANT

Many of the lower court rulings involve violations of treaties by states acting as corporations or participants in the market.[108] In addition, many multilateral and bilateral treaties regulate business activities, such as international trade,[109] between countries rather than private individual activity. Thus, the question of private causes of action may arise between business entities more often than between private individuals and a state.

A possible solution to the Eleventh Amendment immunity question may be to allow states to assert their Eleventh Amendment immunity when they are acting as states only and to prohibit the states from asserting that immunity when they are acting as market participants. Under this doctrinal framework, foreign nations may be more willing to interact with the United States in the international trade arena, without fear of a state refusing to adhere to treaty obligations through its Eleventh Amendment immunity. This structure may alleviate some of the problems associated with Eleventh Amendment immunity from a business/corporate perspective and foster more international trade with the United States.

The Supreme Court may be more willing to uphold such a doctrine because of its similarity to the market participation test found in dormant commerce clause jurisprudence. Under the market participation test, the Supreme Court has held that state action concerned with merely "market participation" was outside the ambit of congressional regulation under the Commerce Clause.[110] Moreover, the Supreme Court has determined that market participation occurs when a states acts as a private corporation or trader.[111]

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108. *See supra* Part IV.B.

109. *See, e.g.*, General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA).

110. *See* Hughes v. Alexandria Scrap Co., 426 U.S. 794, 810 (1976). The market participation doctrine analysis has developed in more recent case law. *See* Reeves, Inc. v. Stake, 447 U.S. 429 (1980); *see also* South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984).

111. *See* Richard H. Seamon, *The Market Participant Test in Dormant Commerce Clause Analysis – Protecting Protectionism?*, 1985 Duke L.J. 697, 705 (1985).

The market participation model in the framework of an international Eleventh Amendment immunity, however, may prove problematic. In a more limited aspect than unconditional Eleventh Amendment immunity, the market participation test allows states to circumvent the treaty process. It creates the same fundamental problems - allowing state regulation of international trade – that the Supreme Court focused on in *Crosby* and *Locke*. Such a doctrine could also pose problems in terms of defining when a state is acting in the capacity of the state qua state or participating in the market.

VII. CONCLUSION

Many critics have attacked the Rehnquist court's Eleventh Amendment immunity doctrine as undervaluing federal law and overvaluing states rights.[112] Scholars, however, may have underestimated the impact that Eleventh Amendment immunity could have on international relations, specifically treaty-based litigation. Current globalization trends could further affect the United States' domestic arena. For example, state and local governments have only recently created their own "foreign policy."[113] Such developments have occurred in response to the impact of globalization, as state and local governments attempt to compete in a world market and encourage investment.[114] Although the Rehnquist court has severely limited individual rights, including restricting private causes of action in the treaty context, a legitimate possibility exists that the Eleventh Amendment and treaty power will come to a crossroads.

The Supreme Court could address such a problem through a variety of doctrinal rationales: continuing to decide cases such as

112. *See, e.g.*, Roger C. Hartley, *Alden Trilogy: Praise and Protest*, 23 HARV.J.L. & PUB.POL'Y 323 (2000); H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U.COLO.L.REV. 645 (2000); John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF.L.REV. 411 (2000); Mark Tushnet, *The Supreme Court 1998 Term Forward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV.L.REV. 29 (1999); Laura M. Herpers, *State Sovereign Immunity: Myth or Reality After Seminole Tribe of Florida v. Florida?*, 46 CATH.U.L.REV. 1005 (1997).

113. *See* Mark Tushnet, *Globalization and Federalism in a Post-Prinz World*, 36 TULSA L.J. 11, 40 (2000) (arguing that the Supreme Court's Crosby decision is in conflict with its federalism doctrine).

114. *See id.*

Crosby and *Locke* on preemption grounds, ignoring the problem and further entrenching an unworkable doctrine of Eleventh Amendment immunity, or the possibility of the Supreme Court applying the market participant test to Eleventh Amendment immunity in the treaty context. Whatever the outcome, the Supreme Court should not allow the states to assert their Eleventh Amendment immunity because of the traditional supremacy of treaty law, the fundamental principal that states cannot create their own foreign policy, and the negative impact that Eleventh Amendment immunity would create both for the United States and foreign nations. Only by recognizing that serious consequences could occur if the Eleventh Amendment issue regarding treaties is not addressed can the Court signify a willingness to adhere to a unified and cohesive foreign policy.

CORY EICHHORN*

* Juris Doctor Candidate, May 2002, University of Miami School of Law. I would like to thank Professors Kenneth Casebeer, Lili Levi, and M. Minnette Massey for their insightful thoughts and inspiration. I also wish to thank Jen Christianson for her support and guidance. Finally, I offer my heartfelt thanks to my parents, Ralph and Susan Eichhorn, for all their encouragement.